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October 7, 1998

Ms. Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554


RECEIVED  
OCT - 7 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

re: *Missouri Petition for Preemption*, CC Docket No. 98-122

Dear Secretary Salas:

Enclosed please find two (2) copies of an ex parte written communication from the Missouri Municipals to the Commissioners, for inclusion in the public record. The letter concerns the preemption proceeding currently before the Commission in the docket noted above, involving a section of the Revised Statutes of Missouri.

Sincerely,

  
James Baller

Enclosures

No. of Copies rec'd 0 + 2  
List A B C D E

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October 7, 1998

**By Hand Delivery**

The Honorable William Kennard  
The Honorable Susan Ness  
The Honorable Harold Furchgott-Roth  
The Honorable Michael Powell  
The Honorable Gloria Tristani

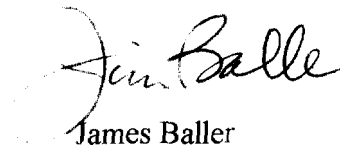
re: *Missouri Petition for Preemption*, CC Docket No. 98-122

Honorable Members of the Commission:

Earlier today, the City of Abilene and the American Public Power Association filed the enclosed brief with the District of Columbia Circuit Court of Appeals in further support of their petition for review of the Commission's *Texas Order*.

The Missouri Municipals adopt the brief, incorporate it into the record of this case, and urge the Commission to consider it in deciding whether to preempt HB 620.

Sincerely,



James Baller

Attachments

cc: See attached list.

***THE BALLER LAW GROUP***

*A PROFESSIONAL CORPORATION*

Honorable Members of the Commission

October 7, 1998

Page 2

cc: John Nakahata, Chief of Staff  
Christopher Wright, General Counsel  
Kathryn Brown, Chief, Common Carrier Bureau  
Thomas Powers, Legal Advisor to Chairman Kennard  
Anita Walgren, Legal Advisor to Commissioner Ness  
Paul Misener, Legal Advisor to Commissioner Furchgott-Roth  
Kyle Dixon, Legal Advisor to Commissioner Powell  
Paul Gallant, Legal Advisor to Commissioner Tristani  
The National Telephone Cooperative Association  
GTE Service Corporation  
SBC Communications, Inc.  
The Attorney General of the State of Missouri

## CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 7th day of October 1998, I caused copies of the foregoing letter to be served on the parties on the attached Service List, by hand delivery, where indicated, and by first-class, U.S. Mail, where indicated

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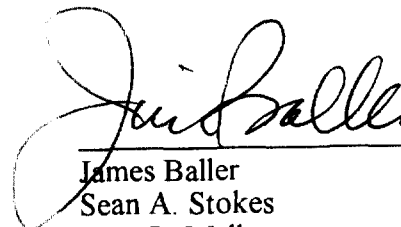
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October 7, 1998

**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

No. 97-1633 and No. 97-1634 (consolidated)

---

**CITY OF ABILENE, TEXAS, et. al.,**

**Petitioners,**

**v.**

**FEDERAL COMMUNICATIONS COMMISSION**

**and**

**UNITED STATES OF AMERICA,**

**Respondents.**

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**On Petition for Review of an Order of the  
Federal Communications Commission**

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**PETITIONERS' MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF**

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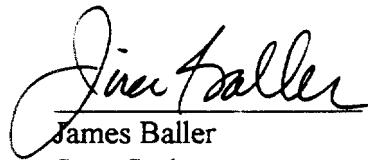
Pursuant to Rule 28(g) of the Rules of this Court, Petitioners, the City of Abilene, Texas, and the American Public Power Association move the Court for leave to file the accompanying Petitioners' Supplemental Brief. The brief discusses new authority that the Federal Communications Commission issued on September 25, 1998, more than a month after Petitioners timely filed their Reply Brief. The new authority is a decision entitled *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, CCBPol 96-17 Memorandum and Opinion on Remand and Order to Show Cause, FCC 98-226 (rel. September 25, 1998) ("Decision on Remand"), 1998 WL 658606.

Oral argument is scheduled for November 2, 1998, so the Court and the parties will receive copies of the brief more than seven days prior to the oral argument.

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October 7, 1998

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James Baller", written over a horizontal line.

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**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 97-1633 and No. 97-1634 (consolidated)**

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**CITY OF ABILENE, TEXAS, et. al.,**

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**v.**

**FEDERAL COMMUNICATIONS COMMISSION**

**and**

**UNITED STATES OF AMERICA,**

**Respondents.**

---

**On Petition for Review of an Order of the  
Federal Communications Commission**

---

**ORDER**

---

Petitioners, the City of Abilene, Texas, and the American Public Power Association, have moved the Court pursuant to Rule 28(g) of the Rules of this Court for leave to file the accompanying Petitioners' Supplemental Brief. Finding that there are good grounds for granting the motion and that the Court and the parties would receive copies of the brief more than seven days before oral argument on November 2, 1998, the Court hereby \_\_\_ day of October 1998, ORDERS that Petitioners' Supplemental Brief be accepted for filing

---

A JUDGE OR THE CLERK OF THE COURT



## CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 7th day of October 1998, I caused copies of the foregoing Petitioners' Supplemental Brief, Petitioners' Motion For Leave to File Supplemental Brief, and Proposed Order to be served on the parties on the attached Service List, by hand delivery, where indicated, and by first-class, U.S. Mail, where indicated.

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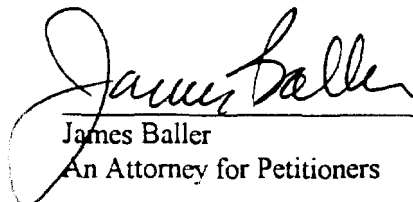
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**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 97-1633 and No. 97-1634 (consolidated)**

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**UNITED STATES OF AMERICA,**

**Respondents.**

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**On Petition for Review of an Order of the  
Federal Communications Commission**

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**PETITIONERS' SUPPLEMENTAL BRIEF**

---

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**October 7, 1998**

## PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 28(g) of the Rules of this Court, Petitioners, the City of Abilene, Texas, and the American Public Power Association, file this supplemental brief to discuss the Federal Communications Commission's new decision entitled *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, CCBPol 96-17, *Memorandum and Opinion on Remand and Order to Show Cause*, FCC 98-226 (rel. September 25, 1998) ("*Decision on Remand*"), 1998 WL 658606. The Commission issued this decision on remand of this Court's decision in *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066 (D.C.Cir. 1997) ("*Alarm Industry*").

In *Alarm Industry*, this Court rejected an unduly restrictive Commission interpretation of the term "entity" in Section 275 of the Telecommunications Act, finding that the Commission had improperly relied solely on a restrictive technical definition in *Black's Law Dictionary* without making any attempt to reconcile its interpretation with the purposes of Section 275. *Alarm Industry*, 131 F.3d at 1069. To demonstrate that the term "entity" need not be interpreted as narrowly as the Commission had interpreted it, the Court cited several definitions from standard, non-technical dictionaries. *Id.* The Court also declined to afford the Commission's interpretation any deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Id.*

In their opening brief, Petitioners maintained that the Court should similarly find that the term "entity" in Section 253(a) of the Act is broad enough to cover municipalities and municipal electric utilities. Final Petitioners' Brief at 28-29. Petitioners noted that at least three of the

definitions that the Court had quoted in *Alarm Industry* apply to government entities.<sup>1</sup> *Id.* Petitioners also argued that such an interpretation of Section 253(a) is necessary to achieve Congress's intent to create a "pro-competitive, deregulatory national policy framework" that would enable "all providers to enter all markets" *Id.* at 33-34, quoting *Texas Order*, ¶ 1; *Interconnection Order*, ¶ 4 (emphasis added).

In its *Decision on Remand*, the Commission has not only held that the term "entity" should be given its broadest possible meaning when necessary to achieve the pro-competitive purposes of the Act, but the Commission has also expressly noted that the term "entity" encompasses government entities.

In paragraph 10, the Commission gives the following overview of its decision:

The D.C. Circuit remanded the *Circuit City* case to the Commission "to resolve the ambiguity in the phrase 'alarm monitoring service entity,'" based on more than a dictionary definition. Consistent with the court's directive, we consider Ameritech's *Circuit City* transaction in light of the concerns expressed by the court regarding the Commission's prior holding. Based on this more extensive analysis, we believe that the Commission's initial *Circuit City Order* defined "entity" too narrowly as an organization requiring a separate legal existence. We now conclude on remand, after examining the statutory objectives underlying section 275(a)(2), that a broader definition of "entity" that includes any organizational unit such as *Circuit City's* Home Security Division is more consistent with the Congressional purpose underlying section 275(a)(2). *This interpretation is also consistent with the idea that "entity" is "the broadest of all definitions which relate to bodies or units," which is recognized by the D.C. Circuit and reflected in judicial and statutory definitions of "entity" in other contexts.* Accordingly, we reject the Commission's prior construction of the term "entity" as used in section 275(a).

*Decision on Remand*, ¶ 10 (emphasis added) (footnote omitted).

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<sup>1</sup> In its response, the Commission did not disagree with this point but argued that the Court's finding in *Alarm Industry* that the meaning of "entity" is "uncertain" supports the Commission's determination in the *Texas Order* that Section 253(a) does not plainly cover municipalities and municipal electric utilities. Respondents' Brief at 14. For the reasons discussed in Final Petitioners' Reply Brief at 8, the Commission's analysis is incorrect.

In paragraph 14, the Commission examines the term "entity" in the context of the pro-competitive purposes of Section 275:

[W]e conclude that Congress apparently viewed section 275(a)(2) as a pro-competitive provision and that it meant to authorize grandfathered [Bell Operating Companies] BOCs to continue in the alarm business and to grow that business only through competition, not through equity acquisitions or asset acquisitions that result in financial control. Congress, in enacting section 275, appeared concerned about ensuring a "level playing field" between the BOCs and the alarm monitoring industry. A broader interpretation of "entity," for purposes of determining section 275(a)(2)'s restrictions, therefore comports best with this stated intent.

*Id.* (footnotes omitted).

The Commission then turns to judicial and statutory definitions of "entity," including those of this Court:

Our review of judicial and statutory definitions of "entity," in other contexts, also supports a broader interpretation of "entity," for purposes of section 275(a)(2). The D.C. Circuit, for example, in reviewing the term "entity" in the context of the Foreign Missions Act, stated that "[t]he meaning of the term 'entity' in general usage is quite broad ...." Similarly, other statutes that use the term "entity," define it to include organizations including, but not limited to, those with a separate legal existence. "*Entity*" has been statutorily defined to include . . . a division of a government bureau...." In contrast, in other contexts, Congress has expressly made statutes applicable to separate "legal entities" when it has so intended, or further defined the type of entity affected by the statute. These further definitions would not be necessary if the term "entity," on its own, was understood to require a separate legal existence.

Finally, as the D.C. Circuit observed in [*Alarm Industry*] v. FCC, most dictionary definitions of "entity" are broad enough to include Circuit City's Home Security Division. For example, *The American Heritage Dictionary of the English Language* defines "entity" as "something that exists as a particular and discrete unit" and defines "unit" as an "individual, a group, a structure or other entity regarded as an elementary structural or functional constituent of a whole."

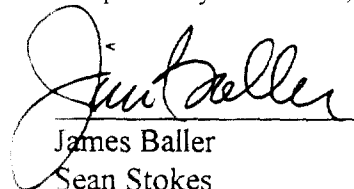
As the court noted, "it is hardly evident why Circuit City's operating division was something other than a 'group' or 'structure' that was a 'functional constituent of a whole,' the whole being the Circuit City corporation -- in other words, the division was a particular and discrete unit, an 'entity.'"

*Id.*, at ¶¶ 16-17 (emphasis added).

Petitioners submit that the Court should apply the same rationale in this case as the Commission has now itself embraced in its *Decision on Remand*. Specifically, Petitioners urge the Court to find that the term "entity" in Section 253(a), as commonly understood, is broad enough to cover municipalities and municipal electric utilities and that interpreting Section 253(a) in this manner best fulfills the Act's pro-competitive purpose of "allowing all providers to enter all markets," *Interconnection Order*, ¶ 4. Furthermore, Petitioners also urge the Court to find, as the Commission did in its *Decision on Remand*, that if Congress had intended the term "entity" in Section 253(a) to be read restrictively, it would have said so expressly or further defined the type of entity covered by that section.<sup>2</sup> Instead, Congress did precisely the opposite by coupling that term with the expansive word "any."

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Respectfully submitted,



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October 7, 1998

---

<sup>2</sup> As previously shown, Congress demonstrated in Section 703 that it knew how to distinguish private from public entities when it wanted to do so. Final Petitioners' Brief at 17-18.

## CERTIFICATE OF SERVICE

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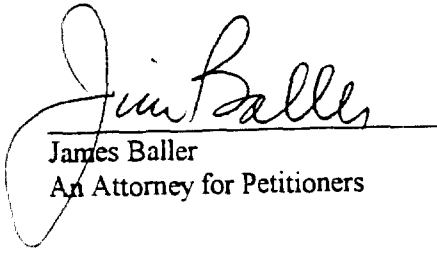
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